FILED
AUG 19 1991
OFFICE OF THE CLERK

(2)

No. 91-108

In The

Supreme Court of the United States

October Term, 1991

CHARLES DIPILLA, et al.,

Petitioners,

vs.

AMSOUTH BANK N.A., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Counsel of Record:
ROBERT LOUIS FISHER,
A Professional Corporation
BARTON, KLUGMAN & OETTING
333 South Grand Avenue
37th Floor
Los Angeles, California
90071-1599
(213) 621-4000
Attorneys for Respondents Steinberg & Short and George Short

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeal abused its discretion by dismissing Petitioner's appeal for lack of prosecution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 3

TABLE OF AUTHORITIES

Page

Circuit Rule 10-3.1 2

Circuit Rule 42-1 2

No. 91-108

In The

Supreme Court of the United States

October Term, 1991

CHARLES DIPILLA, et al.,

Petitioners,

vs.

AMSOUTH BANK N.A., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On May 24, 1988 summary judgment was entered in this action in favor of Respondent, Amsouth Bank and against Petitioners. On October 31, 1988, Respondents, George G. Short and Steinberg & Short moved for summary judgment. The Honorable Harry L. Hupp granted the motion and a judgment was filed and entered on October 31, 1988. Thereafter, on November 29, 1988 Petitioners filed a notice of appeal.

On March 2, 1989 the Ninth Circuit Court of Appeals issued an order directing that the parties immediately comply with Circuit Rule 10-3.1. The order specifically stated that:

> "If appellant fails to designate the reporter's transcript or to file a timely brief or a timely motion for extension of time the appeal will be dismissed by the clerk under Ninth Circuit Rule 42-1."

Subsequently, on or about October 13, 1989 Respondent, Amsouth Bank brought a motion to dismiss the appeal on the basis that Petitioners had failed to prosecute it. Amsouth Bank pointed out in its motion that Petitioners had failed to request or designate a reporter's transcript. Petitioners did not oppose the motion to dismiss and an order was issued on April 2, 1990 dismissing the appeal. On May 24, 1990 a motion for reconsideration of the dismissal was denied.

REASONS FOR DENYING THE WRIT

It is clear that Petitioners' appeal to the Ninth Circuit was properly dismissed for failure to prosecute. Petitioners failed to comply with the Federal Rules of Appellate Procedure by filing any document requesting or designating a reporter's transcript. Respondents, George Short and Steinberg & Short were not served with a request to designate a reporter's transcript. In addition, Petitioners have not been able to produce any conformed copy of such a request, indicating that it was ever filed. Furthermore, Respondent, Amsouth Bank, represented in its motion to dismiss the appeal that a review of the

District Court file revealed that the request for designation of reporter's transcript was not filed.

Moreover, Petitioners failed to file any opposition to Amsouth Bank's motion to dismiss for failure to prosecute. They can hardly claim that they have been denied due process when they themselves chose not to assert their rights by filing an opposition.

CONCLUSION

For all of the foregoing reasons, along with those stated in the Respondents' brief of Amsouth Bank which are hereby incorporated by reference, Respondents George Short and Steinberg & Short submit that the petition for Writ of Certiorari should be denied.

Dated: August 19, 1991

Respectfully submitted,

ROBERT LOUIS FISHER,
A Professional Corporation
BARTON, KLUGMAN & OETTING
333 South Grand Avenue
37th Floor
Los Angeles, California
90071-1599
(213) 621-4000
Attorneys for Respondents
Steinberg & Short and
George Short